

Part III. Administrative, Procedural, and Miscellaneous

Section 529 Programs

Notice 2009-1

This notice provides guidance to qualified tuition programs described in section 529 of the Internal Revenue Code and participants in section 529 programs regarding the restriction on investment direction described in section 529(b)(4). This notice sets forth a special rule under which a program may permit investments in a section 529 account to be changed during 2009 on a more frequent basis than under current rules.

Section 529(b)(4) states that a program shall not be treated as a section 529 qualified tuition program unless it provides that any contributor to, or designated beneficiary under, such program may not directly or indirectly direct the investment of any contributions to the program (or any earnings thereon). The proposed regulations under section 529, which were published in the Federal Register on August 24, 1998 (REG-106177-97, 1998-2 C.B. 344 [63 F.R. 45019]), provide that a program does not violate this requirement if it permits a person who establishes a section 529 account to select among different investment strategies designed exclusively by the program, only at the time when the initial contribution is made establishing the account. Prop. Treas. Reg. §1.529-2(g).

Notice 2001-55, 2001-2 C.B. 299, was issued in response to comments on those proposed regulations, and acknowledged that there are a number of situations that might warrant a change in the investment strategy for a section 529 account. In that notice, the Treasury Department and the Internal Revenue Service (IRS) expressed an expectation that the final regulations under section 529 will provide that a program does not violate the investment restriction under section 529(b)(4) if it permits a change in the investment strategy selected for a section 529 account once per calendar year, and upon a change in the designated beneficiary of the account. The notice conditioned the applicability of this special rule on the program's compliance with a requirement that the program must (1) allow participants to select only from among broad-based investment strategies

designed exclusively by the program, and (2) establish procedures and maintain appropriate records to prevent a change in investment options from occurring more frequently than once per calendar year or upon a change in the designated beneficiary of the account.

In response to concerns that have been caused by the recent condition of the financial markets, commentators have requested more flexibility in this special rule, specifically the ability to change the investment strategies more frequently. Those commentators expressed concern that the inability to do so may interfere with the preservation of the value of a section 529 account in the face of changes in the markets.

Accordingly, this notice amends the provisions of Notice 2001-55 to further provide that a program does not violate the investment restriction under section 529(b)(4) if it permits a change in the investment strategy selected for a section 529 account twice per calendar year for calendar year 2009, as well as upon a change in the designated beneficiary of the account, subject to the program requirements as detailed in Notice 2001-55. The Treasury Department and the IRS expect that final regulations will incorporate this special rule for 2009.

Section 529 programs and their participants may rely on this notice pending the issuance of final regulations under section 529.

The Treasury Department and the IRS invite comments on the matter described in this notice and any other comments relating to section 529. Comments may be submitted to Internal Revenue Service, CC:PA:LPD:PR (Notice 2009-1), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk at 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:PR (Notice 2009-1), Room 5203. Submissions may also be sent electronically via the internet to the following email address: Notice.comments@irs.counsel.treas.gov. Include the notice number (Notice 2009-1) in the subject line.

EFFECT ON OTHER DOCUMENTS

Notice 2001-55 is modified.

DRAFTING INFORMATION

The principal author of this notice is Monice Rosenbaum of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Rosenbaum at (202) 622-6070 (not a toll-free number).

Relief From Immediate Compliance With 2009 § 403(b) Written Plan Requirement

Notice 2009-3

This notice provides relief during 2009 for sponsors of § 403(b) plans with respect to the requirement to have a written § 403(b) plan in place by January 1, 2009. This notice also briefly describes other programs the Service intends to establish relating to § 403(b) plans.

Background

Final regulations under § 403(b) were published on July 26, 2007 (T.D. 9340, 2007-36 I.R.B. 487 [72 Fed. Reg. 41128]) (the final regulations). Effective January 1, 2009, sponsors of § 403(b) plans are generally required to maintain a written plan that satisfies, in both form and operation, the requirements of the final regulations. Although many sponsors of § 403(b) plans have already adopted a written § 403(b) plan, the Service and Treasury are aware that some sponsors may not have a written § 403(b) plan in place by January 1, 2009.

Further, there is no current program under which a plan sponsor can obtain assurance that the written form of its plan satisfies § 403(b), other than through a private letter ruling. The Service and Treasury have therefore concluded that compliance with the final regulations would be facilitated by the establishment of both pre-approved and individually designed plan programs and that transition relief should be